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## **Nazi Law as Pure Instrument: Natural Law, (Extra-)Legal Terror, and the Neglect of Ideology**

### **Instrumentalism and Nazi Law**

The impetus for the presentation of the paper that forms the basis of this chapter, at the 2016 European Society of Comparative Legal History conference at the University of Gdańsk, was the conference's focus on the question of the instrumentality of law. In particular, one of the strands of inquiry incorporated within the conference theme was law's use as an instrument to "transform reality", as a tool to "shape and strengthen national identity". The particular panel in which this paper was presented centred on the nexus of this point with law's role in political projects of total domination, specifically in 20<sup>th</sup> century authoritarian and totalitarian regimes. The subject of this contribution, the role of and relationship between law and ideology in the Third Reich, fits well within this given the transformative (and destructive) aims of the regime and its strong nationalistic (and racist) element.

There can be little doubt that the Nazi leadership wished to, and in many respects did, transform reality in the Third Reich, and that law was to some extent an instrument at the service of their ideological objectives to that end. However, as the theme of the conference attests, law is often instrumentalised, whether functionally or axiologically. Simply put, a ruling party or government has policy objectives and the law is one of the key normative and institutional operators through which it can implement them. This occurs in governments of all political stripes and is not limited to so-called totalitarian regimes. In this sense, the particular application of this question to Nazi law, and to the other 20<sup>th</sup> century authoritarian administrations considered by the panel's papers, is uncontroversial: a comparative examination of how law was used to further the national interest (as defined by the regime) and specifically the role of ideology in this.

However, it is arguably in the specific case of authoritarian and totalitarian regimes that our interpretation of this relationship between policy objective and legal implementation becomes obfuscated by an overriding ideological component. When it is an authoritarian ideology at the heart of government, such as that in Nazi Germany, we tend to interpret the relationship between policy and law, and in particular between governing ideology and legal ideology in a different way. The contention of this chapter, therefore, is that in the case of the Third Reich, given the discursive development of the academic understanding of the role of law in Nazi Germany, there is an *a priori* theoretical question about the nature of both the concept of

instrumentalism and the concept of “law” at play when we confront the regime that brought about the Second World War and perpetrated the Holocaust. This is because the idea of law as a blunt instrument, a crude tool, at the service of state power, with little attention to the real nature and significance of ideological considerations for law, has dominated our legal theoretical understanding of the Nazi legal system. This pure instrumentalisation of law at the service of a repressive regime is particularly prevalent in natural law interpretations of wicked legal regimes, and especially Nazi law.

According to this view, it is a case of the Nazi leadership in the early 1930s initially presenting as a party of law and order, and feigning defence of the existing German *Rechtsstaat* in order to pacify the ruling and influential conservative elites. Over time this turned into the cynical manipulation of the residue of legal norms and processes, primarily to maintain the regime’s hold on power and repress any resistance, and ended with the undermining of the legal system to leave a state of chaos, barbarity and terror, a state of non-law. The naturalistic belief in the necessary connection between law and morality limits the concept of law at play in this account to the rule of law, with the consequence that other Nazi measures intended to implement ideological objectives, which increasingly emerge as their hold on power strengthens, are not conducted through “law” at all and so do not merit historical or theoretical examination *as a matter of law*. This concept of instrumentalism—cynical manipulation of law for oppressive purposes—and of law—as the rule of law, the *Rechtsstaat* – is the predominant hermeneutic lens through which Nazi law is understood as a matter of legal theory. Nevertheless, positivism too is open to accept the “cynical manipulation” paradigm of instrumentalism in relation to Nazi law, just within a slightly broader definition of what constitutes the concept of law. In both cases the centrality of Nazi racial ideology to all aspects of the state, and the possibility of this ideology manifesting itself in an alternative, but recognisably legal, reality, is overlooked, as is an array of recent historiography about other aspects of the Third Reich that attests to its importance.

This chapter is not concerned with broader debates about or between positivism and natural law within the legal academy, or with critiquing the complex theories that underlie each position generally. Its focus is in part much narrower than that, and in part moves in another direction entirely. Its thesis is twofold. The first part is that this particular version of instrumentalism and concept of law has often been applied to Nazi Germany and is the paradigm that most determines our understanding of Nazi law. The second part is that this

interpretation is problematic in light of the historical evidence, both because it oversimplifies the nature of the Nazi legal state and because it completely overlooks the role of ideology in Nazi law; the relationship “between law as a normative order and the overarching ideological framework” of the regime, as the conference panel abstract stated it. Ultimately, the biggest problem for legal theory presented by a simplified interpretation of law in the Third Reich, focused on crude instrumentalism and the separation between law and non-law, is that it renders unnecessary further investigation of the Nazi regime as a matter of law. It excludes from relevance for our dominant concept of law a significant and devastating period of European legal history and prevents us from trying to make sense of, and coming to terms with, what this means for law and legality today.

In order to demonstrate this thesis, this chapter will examine a number of influential analyses of Nazi law advanced since the 1940s, in order to demonstrate their reliance on the approach set out above and highlight problems with this. These include Franz Neumann’s *Behemoth*, Lon Fuller and HLA Hart’s positions in the 1958 Hart-Fuller debate, and more recently the conclusions of Nigel Simmonds and Kristin Rundle. It will then conclude with some preliminary thoughts on applying a broader concept of instrumentalism, such as that implied by the conference theme, to Nazi law.

### **Instrumentalism in the Behemoth State**

At the heart of an examination of the instrumentalism of Nazi law at the service of its ideology is the question of whether Nazi law was really “law” at all; whether the legal system in the third Reich was recognisable and valid as law. Some of the most enduring thinking on the nature and operation of the Nazi system of government with a bearing on this issue, which continues to be influential among historians and others today, comes from two studies by political scientists contemporary to the Third Reich: Ernst Fraenkel’s “dual state” theory of Nazi legality, and Franz Neumann’s ‘behemoth’ account of the structure of the Nazi state.<sup>1</sup> These two conceptualisations of Nazi government are significant because of the extent to which they have subsequently directed the focus of scholarly attention on the constitution of Nazi rule towards the “prerogative” aspect of the Nazi state or away from notions of law and legality altogether. In both cases, the “non-law” aspect is considered the area most interesting and

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<sup>1</sup> ERNST FRAENKEL: *The Dual State: A Contribution to the Theory of Dictatorship*, Octagon Books, New York, 1969 [1942]; FRANZ NEUMANN: *Behemoth: The Structure and Practice of National Socialism 1933-1944*, 2nd edn, Frank Cass & Co, London, 1967.

worthy of study because that is taken to encapsulate the true nature of Nazi Germany; “a tyranny, characterized by arbitrary rule, enforced through intimidation and terror”.<sup>2</sup>

This is most evident in Neumann’s characterisation of the Third Reich as a Behemoth in his book of the same name. This term “depicts a non-state, a chaos, a situation of lawlessness, disorder, and anarchy”, and, according to Neumann, Nazi Germany fit this description as it had “‘swallowed’ the rights and dignity of man, and is out to transform the world into a chaos by the supremacy of gigantic land masses”.<sup>3</sup> There is much that can be learned from Neumann’s structural analysis of National Socialism and the text devotes a few pages to a discussion of the concept of law, positivism and natural law, and the particular manifestation of law in the Third Reich.<sup>4</sup> However, while he states that Nazi law could be considered law “if law is merely the will of the sovereign”,<sup>5</sup> Neumann’s evaluation and argument is that Nazi law is non-law, because it is not “rational either in form or content”.<sup>6</sup> The implications of this for an examination of the instrumentalism of Nazi law are apparent, it is “nothing but a technique of mass manipulation by terror”.<sup>7</sup>

Since law is identical with the will of the Leader, since the Leader can send political opponents to their death without any judicial procedure, and since such an act is glorified as the highest realization of justice, we can no longer speak of a specific character of law. Law is now a technical means for the achievement of specific political aims. It is merely the command of the sovereign ... Law is merely ... a means for the stabilization of power.<sup>8</sup>

It is a combination of the loss of the specific character of law—a specific ideology of law—separate and distinct from the political will of the regime, with an analysis of Nazi law focused exclusively on violence and terror that denies it the quality of law and renders it a pure instrument in Neumann’s analysis.

The former of these two points is dependent on an acceptance of Neumann’s natural law application of the concept of law, and the latter on an ultimately concomitant denial of both a specific Nazi vision of legality and the use of law in the Third Reich for anything more than

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<sup>2</sup> Alan STEINWEIS, Robert RACHLIN, eds.: *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice*, Berghahn Books, New York, 2013, 1.

<sup>3</sup> NEUMANN: *op. cit.*, vii, “Note on the name Behemoth”.

<sup>4</sup> *Ibid.* 440-458.

<sup>5</sup> *Ibid.* 458.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.* 447-448.

terror and repression. While Neumann acknowledges that, in a political sense, law may be “will and nothing else”, the version of law he endorses is a rational concept “...determined by its form and content, not by its origin. Not every act of the sovereign is law. Law in this sense is a norm, comprehensible by reason, open to theoretical understanding, and containing an ethical postulate, primarily that of equality. Law is reason and will”.<sup>9</sup> On this basis Nazi law cannot be considered law, because it undermines the “generality and the abstractness of law together with the independence of the judge”:<sup>10</sup>

...legal standards of conduct acquire greater significance than before because even the restrictions set up by parliamentary democracy ... insufficient as they may have been, have been removed. By its very vagueness the legal standard of conduct serves to bring pre-National Socialist positive law into agreement with the demands of the new rules. National Socialism postulates the absolute subjugation of the judge to the law, but the standards of conduct make it possible for him to introduce political elements even when they conflict with positive law.<sup>11</sup>

This reveals the interdependence of Neumann’s preferred concept of law with his description of Nazi law as an instrument. The particular ethical standard at the centre of this concept of law and the principles that are seen to emanate from that standard, are anathema to the Nazi version of law. As this forms the very definition of valid law, Nazi “law” cannot be valid law, it must be non-law. Absent of any recognisable normative content, Nazi (non-)law is reducible to the will of the sovereign, and this will is intent only on conserving power through terror; “true generality is not possible in a society that cannot dispense with power”.<sup>12</sup> This appears to be the only possibility for a regime intent on being both authoritarian and totalitarian.

A critique of this is not based on its elucidation of some of the characteristics of Nazi legality—use of retroactivity, political influence on judiciary, vagueness of the legal standard of conduct—in Neumann’s analysis, but rather lies elsewhere and is two-fold. First is not accounting fully for the centrality of Nazi racial ideology to the regime, and its potential for a Nazi vision of legality. It is argued that Nazi law was not *only* used for repression, terror and the maintenance of power but was also used for the substantive advancement of Nazi policy objectives beyond merely stabilising power. It did have its own normative and (un)ethical

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<sup>9</sup> *Ibid.* 440.

<sup>10</sup> *Ibid.* 444.

<sup>11</sup> *Ibid.* 447.

<sup>12</sup> *Ibid.* 451.

content. While Neumann hints at the centrality of Nazi ideology in acknowledging that “[t]he main function of National Socialist law is to preserve racial existence”,<sup>13</sup> the implications of this for the nature of Nazi law and how law was instrumentalised by the regime are not fully realised in his evaluation. The only function of Nazi law according to Neumann is to spread terror to maintain power.

Second is that the conclusions drawn about the nature of Nazi law emanate from the theory of law that is adopted to invalidate the Nazi legal regime, so that law apparently cannot have any normative content if it is not the rule of law and accordingly law as terror is the only possible alternative. The natural consequence of this, as noted in the introduction to this chapter, is that Nazi law is now readily excluded from serious conversations about the nature of law and what law may be used for. While it might be appropriate—indeed arguably imperative—to adopt a particular concept of law as a method of furthering resistance to a contemporary tyrannical regime,<sup>14</sup> the enduring influence of an analysis of Nazi law that emphasises its perceived lawlessness has acted as an obstacle to our better understanding of how the Nazi regime operated as a matter of law even as more and better historical evidence about the institutions and governance of the Third Reich has become available since the post-war period.

In his discussion of the Nazi legal system, while disagreeing with Fraenkel’s views on the presence of law in the Third Reich, Neumann makes some reference to the divide between the “normative” and “prerogative” state that characterises Fraenkel’s dual state analysis. He notes that “[t]he average lawyer will be repelled by the idea that there can be a legal system that is nothing more than a means of terrorizing people. He will point out that hundreds of thousands, perhaps millions, of transactions in Germany are handled according to calculable and predictable rules. That is true”.<sup>15</sup> These “‘culturally indifferent rules’ of a predominantly technical character”, are a function of “the increasing complexity of modern society” according to Neumann.<sup>16</sup> He also concedes that “even in the so-called ‘prerogative state’”, we can witness the rational application of such technical rules,<sup>17</sup> but these are not the sort of laws that Neumann is primarily concerned with when drawing conclusions about Nazi legality.

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<sup>13</sup> *Ibid.* 452.

<sup>14</sup> Douglas G. MORRIS: *Write and Resist: Ernst Fraenkel and Franz Neumann on the Role of Natural Law in Fighting Nazi Tyranny*, *New German Critique*, 42(2015)/3, 197-230.

<sup>15</sup> NEUMANN: *op. cit.*, 440.

<sup>16</sup> *Ibid.* 440.

<sup>17</sup> *Ibid.* 440.

The contrast between Neumann's behemoth and Fraenkel's dual state comes in the assertion by the latter that the normative state in particular operated in the Third Reich as part of the legal system, that there was to an extent law in the Third Reich. The normative state consisted of the vestiges of the pre-existing "normal" legal state of affairs and was "an administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies".<sup>18</sup> The prerogative state, by contrast, was the arbitrary rule of the government, unrestrained by formal law: "that governmental system which exercises unlimited arbitrariness and violence unchecked by any legal guarantees".<sup>19</sup> The prerogative state was parasitic, over time, on the normative state, as radicalisation and chaos took hold, and more and more aspects of the state were pulled into the arbitrary realm, away from the safeguards of "normal" law.

It is possible to draw a rough parallel, even if not exact, between Fraenkel's normative state and Neumann's "culturally neutral" technical rules; and Fraenkel's prerogative state and Neumann's law as violence and terror. However, while the normative state may have tended towards a narrower realm of technical rules, an important feature of it is that it encompassed the residue of the pre-existing, *Rechtsstaat* and legal institutions, which continued to function to varying degrees and for differing periods into the Third Reich. Fraenkel argued that the state comprised a combination of arbitrariness (the prerogative state) and efficient order (the normative state),<sup>20</sup> rather than merely arbitrariness, but still made a distinction between the legal norms governing society and the exercise of political power in asserting the prerogative of the sovereign while emphasising the instrumentalism of the law at the hands of the regime:

The entire legal system has become an instrument of the political authorities. But insofar as the political authorities do not exercise their power, private and public life are regulated either by the traditionally prevailing or the newly enacted law ... Normal life is ruled by legal norms. But since martial law has become permanent in Germany, exceptions to the normal law are continually made. It must be presumed that all spheres of life are subjected to regulation by law. Whether the decision in an individual case is made in accordance with the law or with "expediency" is entirely in the hands of those in whom sovereign power is vested.<sup>21</sup>

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<sup>18</sup> FRAENKEL: *Op. Cit.*, xiii.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*, xvi.

<sup>21</sup> *Ibid.*, 57.



According to the “dual state”, the exercise of arbitrary rule, governed by the politics of the regime, comes within the prerogative sphere whereas the application of the ordinary law, less influenced by political concerns, falls within the normative state. The realm of terror and disorder, the lawless realm, is devoid of the sort of legal safeguards that Neumann associates with the rule of law. The “normal law”, by contrast, is largely free from influence by the ideology of the state.

While the dual state provides a more differentiated vision of Nazi law than Neumann’s lawless Behemoth state, therefore, we still find within it a concentration on the prerogative sphere as the political realm of the law, parasitic on the pre-existing legal system. To an extent, of course, this was what happened, the Nazi regime gradually changed the law and introduced new, Nazified principles and instruments, and the regime continued to operate within both systems for a long time. It is problematic, however, to characterise them in this way, as two parallel legal systems, because it excludes Nazi legality from consideration as “normal” law and, conversely, excludes ideology from the normative state. This tends to return to a position where the prerogative state is a lawless, arbitrary, barbarous, law as terror and the prerogative state is the rule of law, manipulated and undermined by the regime.

Fraenkel’s analysis has remained popular among historians of the Third Reich as an explanation of how the legal system operated in tandem with the regime,<sup>22</sup> and Neumann’s account become hugely influential in the framing of the Nazi legal system in the Nuremberg Military Tribunals,<sup>23</sup> and has continued to be the prevailing understanding of Nazi law, at least in the Anglo-American historical academy, in the period since. It is possible see some of the key characteristics of these analyses in a number of subsequent studies of Nazi law. In particular, the application of the natural law theoretical paradigm and the characterisation of Nazi “law” as exclusively terror, has resulted in the prevalence of a narrow conception of the regime’s aims—as attaining and preserving power—and how law was used to achieve those aims—as a form of pure instrumentalism with no independent ideological content.

### **Instrumentalism in the Hart-Fuller Debate**

The 1958 Hart-Fuller debate between Lon Fuller and HLA Hart provides an important forum in which Nazi law was discussed in terms of legal philosophy, and in which the trope of pure

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<sup>22</sup> See, for example, STEINWEIS, RACHLIN: *op. cit.*, 2.

<sup>23</sup> Kim C. PRIEMEL, Alexa STILLER, eds., *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography*, Berghahn Books, New York, 2012.

instrumentalism and associated characteristics evident in from the earlier scholarly interventions about Nazi law, were applied to the Nazi legal system.<sup>24</sup> The academic significance of the debate in framing the central issues for analysis of the concept of law and the terms of the ongoing debate, particularly for the Anglo-American jurisprudential community, should not be underestimated, and its merits and influence continues to be eagerly discussed.<sup>25</sup> The purpose of this section is not to rerun the debate or describe in detail the arguments of the two protagonists, but rather to highlight how both Fullerian natural law and Hartian positivism endorsed the application of a concept of pure instrumentalism to the Nazi legal system. Aside from providing further examples of the prevalence of this approach, this also reveals that this approach is not exclusively the domain of natural law, even though it has a specific correspondence to that theory. The positivist paradigm too is compatible with an historical interpretation of the Nazi regime that views it entirely as a terror state and overlooks the role of a constructive ideology in the framing of the legal system.

The Hart-Fuller debate famously took a post-war “grudge informer” case from the federal Republic of Germany as a starting point for a dispute about how best to understand the concept of law. The main questions engaged by the debate were the validity question—what are the conditions of validity for law—and the separability question—is law necessarily connected to morality. Natural lawyer Fuller claimed that law had its own “inner morality” comprising eight fundamental principles, with much in common with the tenets of the rule of law, that meant it was necessarily connected to morality. As Nazi law did not conform to these principles, Fuller argued it was not a valid legal system:

To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints

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<sup>24</sup> The Hart-Fuller debate primarily consisted of H.L.A. HART: *Positivism and the Separation of Law and Morals*, Harvard Law Review, 71(1958)/4, 593-629; and Lon FULLER: *Positivism and Fidelity to Law — A Reply to Professor Hart*, Harvard Law Review, 71(1958)/4, 630-672.

<sup>25</sup> See, for example, Peter CANE, ed.: *The Hart-Fuller Debate in the Twenty-First Century*, Hart Publishing, Oxford, 2010; and *New York University Law Review Symposium: Fifty Year Later*, New York University Law Review, 83(2008)/4, 993-1212.

imposed by the pretence of legality—when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law.<sup>26</sup>

Positivist Hart argued that the conditions of validity for law were much less substantial than this, with the requirement being that it was correctly enacted according to the internal, formal rules of the system, regardless of other characteristics and principles, supplemented by a very minimal natural law content. Law and morality could be connected in practice, but were conceptually separable, so Nazi law could be considered valid as law.

This chapter so far has highlighted the connection between natural law, law as terror, and pure instrumentalism, and in the above quote from Fuller, it is possible to see some of the features of Neumann's analysis present. Fuller refers to the regime "cloth[ing] itself with a tinsel of legal form", "depart[ing]" from legal standards, "resort[ing] to forays of terror" and maintaining the "pretence of legality". Fuller predominantly examines Nazi law through a few examples and with reference to breaches of certain tenets of the rule of law (morality of law), such as stability, consistency of administration, and the prohibition on retroactivity.<sup>27</sup> Nazi Germany is presented as a regime that attempted to maintain the façade of formal legality while manipulating and undermining the substance of law, not through ideological infusion of an alternative substance into the law, but through resort to terror at every turn.

For Fuller the question is "[h]ow much of a legal system survived the general debasement and perversion of all forms of social order that occurred under the Nazi rule".<sup>28</sup> Nazi "law" was a "debasement and perversion" of real law, against which the pre-existing legal system struggled to survive. As with Fraenkel this creates a false opposition between "normal" law and lawless, arbitrary terror and, as with Neumann, depicts the entire system that results as non-law, such as the undermining of what law actually is. Fuller's natural law paradigm brings with it a narrow definition of what constitutes law which was anathema to the Nazi regime. Consequently the Nazi approach to law can only be treated as something else entirely, and any relationship to actual law could only be in the form of pure instrumentalism—the pretence of law used to terrorise, repress and preserve power. While these attributes of the Nazi regime should certainly not be discounted, Fuller's theory gives no consideration to the role of ideology in Nazi law. For Fuller, it was not a system "...where lawyers are still at least as

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<sup>26</sup> FULLER: *op. cit.*, 660.

<sup>27</sup> Lon FULLER: *The Morality of Law*, Yale University Press, New Haven Connecticut, 1964.

<sup>28</sup> FULLER: *Positivism...*, *op. cit.*, 646.

interested in asking ‘What is good law?’ as they are in asking ‘What is law?’”.<sup>29</sup> In reality, however, the opposite was the case. The Nazis were not ultimately very interested in what constituted law in the formal sense, but only what constituted substantively “good” law; law that furthered the national community.

Hart says very little about the nature of Nazi law, partly because his theory applied much less onerous standards for achieving validity as a legal system, and partly because in his case “the appearance of law is all that matters”,<sup>30</sup> so it was not considered necessary to dig too deep into the actual workings of the system. However, the embrace of positivism and with it a broader concept of law and legality based on formal and procedural criteria does not, in the case of the Third Reich, bring with it a rejection of pure instrumentalism as a lens through which to view Nazi law. While it entails a rejection of natural law and the tenets of the rule of law as conditions of validity for law, and consequently accepts Nazi law as law, at least in theory, it is still possible within the positivist paradigm to interpret that Nazi use of law as pure instrumentalism. It is, for Hart as much as Fuller, the manipulation of law for the exercise of tyranny with no attention to its underlying ideological substance. In this version too “...the Nazi regime in fact depended on a kind of blindness to anything but the formal semblance of legality in order to gain legitimacy for its actions”.<sup>31</sup> Accordingly, while there is a necessary connection between natural law and pure instrumentalism as applied to the Third Reich, this does not preclude the possibility of positivism also being associated with this interpretation in discursive practice.

### **The Instrumentalism of Law in “wicked legal regimes”**

The connection between natural law theory and a particular interpretation of the instrumentalisation of law in Nazi Germany is clearly expressed in some of Nigel Simmonds’ writings about so-called wicked legal regimes. In his discussion of “evil regimes” in *Law as a Moral Idea*, Simmonds in fact discounts real historical cases of wicked law (including Nazi law) from further consideration as serious subjects of study for those interested in the use of law for evil ends—and in the battle between positivism and natural law for hegemony over the concept of law—because, he argues, it is only hypothetically possible to imagine a regime able to “follow the rule of law closely, while making no pretence of governing justly”.<sup>32</sup> It is the

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<sup>29</sup> FULLER: *Positivism...*, *op. cit.*, 648.

<sup>30</sup> DESMOND MANDERSON: *Two Turns of the Screw*, ed. Peter CANE, Hart Publishing, Oxford, 2010, 204-205.

<sup>31</sup> *Ibid.*

<sup>32</sup> N.E. SIMMONDS: *Law as a Moral Idea*, OUP, Oxford, 2007, 63.

*pretence* of governing justly that is important for Simmonds, and most relevant to the connection between natural law and instrumentalism at issue here because, according to this theory, wicked rulers exclusively manipulate the law and know they are manipulating the law. Simmonds' aim is to demonstrate the divergence in principle between self-interest and the rule of law, and the convergence in principle of moral considerations with the rule of law, and for this actual wicked legal regimes are all too easily explained because they only ever pretend to follow the rule of law when it suits their ambitions for power.

While, for Simmonds, there might be examples of individual wicked laws within an established historical system, these say nothing about the serviceability of a legal system generally for evils ends. In historical instances of wicked regimes (although absent a detailed consideration of any particular case), the evil regime is aware that law is good, and knowingly manipulates the law for reasons of self-interest, primarily in order to maintain power. This, therefore, only serves to enhance the case for natural law against positivism because a wicked regime adopting the cloak of legality automatically “invokes an assumed connection between those institutions and moral motivation of precisely the kind that the mundane view [legal positivism] seeks to question”.<sup>33</sup> Consequently, “[w]icked rulers motivated by pure self-interest are unlikely to find that observance of the rule of law is in their interests, for a willingness to deploy violence outside the bounds of the published rules is a highly effective device for the securing and entrenching of a regime's grip on power”.<sup>34</sup>

When addressing hypothetical wicked regimes, which are suggested to pose a stronger potential challenge to the natural law paradigm, a similar overarching point is made, that evil rulers are motivated by self-interest and are incentivised to manipulate the law (the rule of law) to these ends rather than to comply with it for genuine, if malevolent, reasons. For example, wicked regimes “typically allow some room for laws and policies aimed at improving the overall expectations of the populace, so as to stiffen incentives for compliance with the law”.<sup>35</sup> And:

...while wicked rulers will have good reason to publish rules and enforce them, they will have no reasons of self-interest for respecting a most fundamental requirement of the rule of law: the requirement that official violence should be used only in response to the violation of the law by others. Wicked rulers ... will have powerful

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<sup>33</sup> *Ibid.*, 60-62, 62

<sup>34</sup> *Ibid.*, 100.

<sup>35</sup> *Ibid.*, 95.

reasons for departing from this requirement, while the only good reasons for respecting the requirement are grounded in moral considerations.<sup>36</sup>

Again here, adherence to the principal tenets of natural law, including the necessary connection between law and morality – law as the rule of law – is strongly connected to a particular understanding of the nature of wicked regimes, including the Third Reich, according to which law can only be used as a crude instrument; a means of quelling resistance and strengthening power. Whether in a real, historical case of an evil regime, such as in Nazi Germany, or a hypothetical case, the regime, motivated by self-interest, uses the cloak of legality to “stiffen incentives for compliance” and buttress support among those who value the rule of law. They gradually move away from adherence to the rule of law in order to repress resistance and maintain power, still motivated by self-interest. Meanwhile, it is not possible to be evil and comply with the rule of law because the only “good” reasons for respecting the rule of law are moral reasons.

In this view, as with Fuller, the rule of law is law, and law that does not comply with the moral substance we attribute to the rule of law cannot be considered law at all. Logically, Nazi policies could not be carried out through legal means, and so Nazi law must be non-law. Law is only every instrumentalised by the Nazi regime to further self-interest, ensure the endorsement of society and incentivise compliance with the law. And whereas for natural law, law is not always an instrument, because it maintains its own separate, inherent morality, law in wicked regimes is a crude instrument cynically manipulated by leaders motivated entirely by self-interest and only concerned with ensuring control and oppression of the population.

This application of natural law to wicked legal regimes displays similar characteristics to the analyses of Neumann and Fuller, and brings with it similar problems. Chief among these is that it underplays the potential importance of ideology to the Nazi project, and the extent to which this had a bearing on the type of laws and legal system that were put in place. The attribution of pure self-interest as the dominant if not exclusive motivation of the Nazi regime enables a clear distinction to be drawn between the “good” of (the rule of) law and the (cynical, manipulative) wickedness of the regime. It also means that, according to this world view, law must only be an instrument in the hands of the regime. A more complex understanding of the motivations and policies of the Nazi regime and the possibility of alternative ethical criteria

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<sup>36</sup> *Ibid.*, 78.

being used to judge what constitutes “good” law and justice undermines the evidential support for this sort of instrumentalism in the case of the Third Reich.

Again, that is not to say that the Nazi leadership, especially in the earliest years of power after 1933, did not claim to defend the *Rechtsstaat* in order to secure and maintain the support of the conservative elite and some sections of German society, nor that they did not have a different vision for the Nazi legal system, which was not dependent on the rule of law. It would be wrong to say the Nazis were wedded to the idea of the rule of law, and Hitler had no interest in maintaining the *Rechtsstaat* beyond that which was necessary. As German legal historian Michel Stolleis has stated;

We know that the National Socialist regime took a strong interest in preserving the impression of normality. Its rule was based essentially on its ability to gain the cooperation of the bourgeois economic elites and, above all, the civil servants and judges who were discontent with the Weimar Republic. Those elites were largely nationalistic and antiparliamentarian in their thinking, but they also had a strong dislike of open terror. Before they could come to terms with the Nazi regime, they needed to be reassured that a national *Rechtsstaat* (state based on the rule of law) would be established, that everything would be done in accordance with the law, and that excesses would not be tolerated. ... As far as the legal system was concerned, the initial strategy of the National Socialists was therefore to change only those elements that were indispensable to securing power and demarcating the main ideological positions.<sup>37</sup>

The Nazi vision of legality was starkly different to the liberal vision, which presented many obstacles to what the Nazis wanted to achieve with German society. But this is not the same as saying the Nazis only wanted power for power’s sake, and only used law in order to spread terror and maintain power. This grossly underestimates the conviction of the Nazi leadership to a broader ideological vision, beyond an authoritarian struggle for power, involving the transformation of the German state, society and legal system, as unsupportable, objectionable and ultimately disastrous as their vision was.

The Stolleis quote makes reference to the necessity, even at the start of the regime, to use law to stake out its fundamental ideological positions as well as to secure power. A complete focus on the latter to the exclusion of the former misrepresents the nature of both law and ideology

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<sup>37</sup> Michael STOLLEIS: *Law and Lawyers Preparing the Holocaust* (2007) 3 Annual Review of Law and Social Science, 3(2007), 213-231, 215.

in the Third Reich. As in earlier cases, this interpretation aligns the implementation of Nazi policy through “law” as terror exclusively with the prerogative state and excludes it from the ambit of what is considered to be law. It allows us to make the clear distinction between what “law” is capable of—discrimination, emergency rule, perhaps some repressive measures—and what it is not capable of—mass deportation, large scale killing, the advancement of an ideological vision of law completely opposed to the principles of the rule of law.

### **Natural Law, Non-Law and Instrumentalism**

When “(non-)law as terror” is the only or predominant paradigm used to interrogate and interpret the Nazi legal system, as well as often excluding from legal examination those elements considered to fall outside of the realm of law—the lawless barbarity, the criminal state, the acts of murder; the Holocaust<sup>38</sup>—the focus naturally shifts towards the undermining of the pre-existing safeguards within the legal state and specifically law’s role in repression and persecution in the early years of the regime. The argument presented in this chapter does not wish to eradicate this focus as, to reiterate, terror, repression, the destruction of the *Rechtsstaat* and the maintenance of political control, were significant characteristics of the regime and, in the case of the first two of these elements in particular, not only in its earliest years. Rather it intends to advance the case that it was largely “law” that was used both for these purposes and the implementation of even more extreme measures, and that the consideration of Nazi law should extend to its normative role in constructing a Nazi identity and vision of society; its use as an instrument to transform reality, not exclusively to obliterate it.

However, the focus on law as terror and the themes of lawlessness and crude instrumentalism continue to permeate legal theoretical literature specifically focused on Nazi law. This is referred to in more recent legal historical engagements with Nazi law. For example, in the recognition that “[t]he agreed-on version in general historiography seems to be: the 12 years of National Socialist rule are 12 dark years that represent a rupture in German history”,<sup>39</sup> the acknowledgement that “[i]t may seem paradoxical to speak of law and despotism in the same

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<sup>38</sup> David FRASER: *Law After Auschwitz: Towards a Jurisprudence of the Holocaust*, Carolina Academic Press, Durham North Carolina, 2005.

<sup>39</sup> Thomas VORMBAUM: *A Modern History of German Criminal Law*, Springer, Berlin, 2014, 172.



breath, for to do so raises the dilemma of the existence of law in a system that is on the whole unlawful and un-just”,<sup>40</sup> or the assertion:

A book about the law in Nazi Germany might strike some readers as an exercise in contradiction. They understand the Nazi regime as a tyranny, characterized by arbitrary rule, enforced through intimidation and terror. The hallmark of Nazi society, as they understand it, was not law, but lawlessness.<sup>41</sup>

An example of a legal theoretical analysis of Nazi law that illustrates a continued focus on lawlessness and makes the repressive aspects of Nazi law representative of the legal system as a whole, through the conceptual intermediary of natural law theory, is Kristin Rundle’s advocacy of a deeper account of Fullerian natural law as it applies to the Nazi state.<sup>42</sup> Rundle’s thesis centres on a defining legal moment around the time of *Kristallnacht* in November 1938 at which point, the claim is, legal discrimination and persecution became extra-legal (non-law) oppression and extermination. Based primarily on an assessment of the 1935 Nuremberg Laws and some contemporary diary accounts of Jews living in the Third Reich, Rundle argues that while in the early years of the regime repression was conducted through legal means, after 1938 the possibility of acting as a legal subject under the law ceased to exist and Nazi policy was implemented outside of the law.

Despite Rundle’s assertion that “the Nazi legal campaign against the Jews is capable of carrying the label of law”,<sup>43</sup> this only goes so far in time, and in fact her evaluation of Nazi law and application of natural law theory to it has much in common with other approaches discussed here that invalidate the Nazi legal system as a whole. Three points are particularly worthy of mention. The first is that the analysis is always drawn to the point of non-law, the significance of lawlessness to the regime’s worst excesses, which, as in previous cases, denies the very possibility of law’s complicity in the implementation of particularly evil objectives. Nazi policy after 1938 “...belonged to an extra-legal world of SS directives that remained, at all times, contingent on the whims of those who had the power to issue them”,<sup>44</sup> which

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<sup>40</sup> STOLLEIS: *op. cit.*, 214.

<sup>41</sup> STEINWEIS, RACHLIN: *op. cit.*, 1.

<sup>42</sup> Kristen RUNDLE: *The Impossibility of an Exterminatory Legality: Law and the Holocaust*, University of Toronto Law Journal, 59(2009)/1, 65-125; and Kristen RUNDLE: *Law and Daily Life – Questions for Legal Philosophy from November 1938*, Jurisprudence, 3(2012)/2 429-444.

<sup>43</sup> RUNDLE: *Impossibility...*, *op. cit.*, 102.

<sup>44</sup> *Ibid.*, 76.

consequently renders those very acts of state that were most devastating uninteresting and irrelevant as a subject of legal study.

The second is that the characterisation of the relationship between the regime and the legal system as one of the erosion and undermining of the latter by the former until it is no longer law. From November 1938, Rundle argues, the parasitic influence of Nazism on the legal system engendered “a degenerative process that involved successively greater departures from conventional standards of legality as time progressed”.<sup>45</sup> While Rundle does not specifically resort to the language of instrumentality, cynical manipulation, the cloak of legality or the “tinsel of legal form”, this is the implication of a focus on law being undermined, as opposed to it being reconstructed according to a different conception of legality. The narrative of descent into arbitrariness and lawlessness remains the same but is shifted in time to a later date. Consequently, Desmond Manderson’s criticism of Fuller’s 1958 analysis of Nazi law is equally apt here, as this “does not acknowledge Nazism did not merely corrupt a legal system. It realised a vision of it...”.<sup>46</sup> This ignores the constructive objectives of Nazi ideology in favour of the destructive aspects, whereas both were important and both had an impact on the legal system.

The third point—related to the second—is the concentration on law as terror; the use of law (and non-law) to repress and persecute. This was undoubtedly a significant and substantial function of law in the Third Reich and a central aspect of the implementation of Nazi racial policy, and the argument here is not that attention should be drawn away from this entirely. However, Rundle’s thesis assumes that criminal legislation directed at Jews is characteristic of the whole Nazi legal system, and that component should be exclusively rendered from the subjectivity of Jews suffering from persecution by the law. Again, this is undoubtedly important, but it does not capture either the whole system of law and especially, as noted in relation to the previous point, the relationship between law and the constructive aspects of Nazi ideology. It is problematic to invalidate (from November 1938) Nazi law as a system on this basis. The importance of natural law theory to the particular direction and scope of this argument is also noteworthy. As in other cases, its application goes hand in hand with these points, and its implication is that we need not be concerned with how the Nazi regime advanced its ideology and transformed the normative framework of society as a matter of law.

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<sup>45</sup> *Ibid.*, 87.

<sup>46</sup> MANDERSON: *op. cit.*, 212.

Some of the characteristics of the literature discussed in this chapter are also ostensible in other recent studies of Nazi law that do not necessarily or explicitly adopt a naturalist paradigm of the concept of law. In particular they tend to allude to the both law and non-law in the Third Reich without expressly addressing or resolving the tension between the two. Thomas Vormbaum writes about the “*manifest unlawfulness* of the National Socialist regime and its exorbitant crimes”<sup>47</sup> in a history of German criminal law in which it is also asserted, for example, that the Reichstag Fire Decree of February 1933 “*legitimised* the SA’s system of terror”.<sup>48</sup> Hans Petter Graver, in a book focused on the role of judges in anti-rule of law regimes, has also argues:

From the point of view of legal theory, there must be something flawed with the legal system where judges can contribute to atrocities. *Either what seems to be a legal order is not a legal order at all* or there is something wrong with the approach and methods of judges in oppressive societies since they depart from their task as guardians of the rule of law. The answer may be a combination of both if one claims that it lies in the inability of such judges to distinguish between *law in the true sense and the oppressive non-law of authoritarian regimes*.<sup>49</sup>

Graver suggests that Nazi law constitutes a version of “oppressive non-law” as the potential “flaw” in the legal system that allows judges to be complicit in an atrocity like the Holocaust. The Nazi legal regime may have been flawed in many respects, including when measured against a particular standard of “good law”, but it is not clear from evidence that this is because it “is not a legal order at all” or on what grounds this conditional claim is made. This view is advanced alongside indications that the Nazi legal system – at least by some measures – was law, although these appear somewhat confused in their mutual compatibility. There is some acknowledgement of the role of an alternative ideology in fashioning the legal system, as Nazi judges “...sought to construct a coherent and applicable normative body of principles from the programme and ideology of the Nazi party”<sup>50</sup>. The focus, however, is clearly on the manipulation and re-purposing—not to say instrumentalisation—of the pre-existing legal state into an organ of terror. For Graver, “[t]he Nazi experience shows how a dictatorship can take over almost all of the legal norms of a preceding regime and transform them by legal

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<sup>47</sup> VORMBAUM: *op. cit.*, 264. Italics are mine.

<sup>48</sup> *Ibid.*, 181. Italics are mine.

<sup>49</sup> Hans Petter GRAVER: *Judges Against Justice: On Judges When the Rule of Law is Under Attack*, Springer, Berlin, 2015, 207. Italics are mine.

<sup>50</sup> *Ibid.*, 229.

reinterpretation to a system of oppression”,<sup>51</sup> and “[t]he continuity of the legal order was ensured by maintaining legal language and concepts such as legislation, constitution, legal certainty, contract, property, public security, and the like, and by giving them a totally new content”.<sup>52</sup>

In its incorporation of the idea of *legal* norms being infused with new ideological content, this interpretation entails a more subtle transformation of law than simply the gradual destruction of the pre-existing legal state into an extra-legal realm of barbarity and terror. It nevertheless continues the thrust of the academic narrative along the lines of pure instrumentalism and law exclusively used for terror, while making room for the idea of Nazi law as non-law. There are questions here both about the extent to which the Nazi regime did entirely co-opt existing legal norms as against the infusion of Nazi-specific concepts and principles into the legal system, and about the potential inconsistencies between the different interpretations presented. It may not be contradictory to say Nazi law did not measure up to a certain standard of “good law” and from that point of view, it can be criticised on grounds of morality, while also saying Nazi law was to all intents and purposes a functioning legal system and needs to be evaluated as such from an academic perspective. However, it is not always evident, as in the examples of Vormbaum and Graver, that this is the view being advanced. It is, often in legal historical accounts, the omission to offer a clear legal theoretical interpretation of the nature of the Nazi legal system that enables the perpetuation of a narrative of pure instrumentalism. Indeed, it may be the prevalence of that narrative, and the other elements associated with it, that make a new systemic legal theoretical analysis of the Nazi regime appear unnecessary.

### **Ideology, Instrumentalism and the National Community**

The various examples in this chapter of interpreting Nazi law primarily through a narrow concept of crude instrumentalism, founded on the twin and co-dependent pillars of natural law and law as terror have, as has been asserted, resulted in a neglect of the relationship between the overarching ideological framework of the regime and Nazi law as a normative order, as well as an undue concentration on the “non-law” interpretation of Nazi law. It has also had a further consequence, which has been to overlook, as a matter of legal theory, the important role of law in facilitating the realisation of the *Volksgemeinschaft*—the imagined Aryan “national community”—around which Nazi racial ideology and policy was constructed. This represents

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<sup>51</sup> *Ibid.*, 30.

<sup>52</sup> *Ibid.*

the essential “other side of the coin” to the use of law for discrimination, persecution and extermination without which these elements are unlikely to have been implemented to the same extent.

The overall impact of a dominant representation of Nazi (non-)law based on pure instrumentalism is that “...scholarship may have suffered from the erroneous perception that the law did not matter in Germany during the Nazi period”.<sup>53</sup> This is not the case, and it is important to take steps to overcome this misperception, which involves first the acceptance that it is law that we are talking about that was complicit in some way in almost everything in Nazi regime up to and including the Holocaust: “Nazi law was law, in one form or another, and it is at the more nuanced levels of debate that we must address these questions”.<sup>54</sup> Second is to recognise that this legal system was more than just a system of terror, as important as that aspect undoubtedly was, so the Nazi regime did not only instrumentalise the pre-existing *Rechtsstaat* to achieve and maintain power, before dismantling it to leave chaos and lawlessness. Third is to seriously examine the idea that the Nazis attempted to infuse law with a different normative basis and set of values based on its racial ideology, and to consider the implications of this. Then it will be possible to properly consider the instrumentalism of Nazi law in the way intended in conference proceedings that inspired this paper; its use to transform reality in the Third Reich.

When assessing how the Nazi regime instrumentalised the legal system in order to implement and achieve its ideological objectives, it is important to eschew a narrow concept of what constitutes “law” and consider more than what happened to the pre-existing legal regime, in the very early stages of the regime, and consequently look beyond crude and cynical instrumentalisation for purposes of terror and power preservation. Otherwise we do not see the full picture of how law was used to advance and realize National Socialist policy. Those limitations both preclude further research into, and understanding of, the part that law played in persecution, exclusion, and genocide across the whole period of Nazi rule, and prevent us from coming to terms with the complicity of law in authoritarian and totalitarian regimes; what law, as a concept, is capable of being used for, and how this happens in practice.

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<sup>53</sup> STEINWEIS, RACHLIN: *op. cit.*, 1.

<sup>54</sup> David FRASER: “*This is Not like any other Legal Question*”: a Brief History of Nazi Law before UK and US Courts, Connecticut Journal of International Law, 19(2003/04) 59-125, 124.

A concept of validity and legality based on the rule of law or other moral considerations may serve an important purpose as a standard of “good” law against which it is possible to measure the conduct of a regime in order to establish, for example, if it is indeed “wicked”, and whether it might be necessary to consider resistance against it. In the historical case of Nazi Germany, however, the regime’s iniquity is beyond reasonable doubt and the time for resistance has passed. More urgent now for lawyers and historians is to examine how the regime functioned as a matter of law and understand what implications this may have for the nature and operation of law generally. The primary aim of this chapter has been to elucidate and critique the prevailing interpretation of Nazi law as pure instrumentalism, and there is not space here to offer a full account of either the relationship between Nazi law and the overarching ideological framework of the regime or what an alternative version of instrumentalism based on this looks like. The remainder of this chapter, however, will consider some preliminary thoughts in this direction.

With reference to the idea of a lingering normative state and a racialized, parasitic, Nazified prerogative state, Stolleis argues that:

it is a myth that some areas remained entirely untouched by the political claims of the system. Neither the frequently cited land register law, nor the social security or tax laws, nor the law concerning debts, property, family, and inheritance was in any way immune.<sup>55</sup>

This conclusion has two implications for the arguments in this chapter. The first is that law in Nazi Germany was not merely the leftover residue of the *Rechtsstaat*, largely untouched by ideology, until it was used and eroded over time by arbitrariness and terror so all that was left was pure, prerogative, non-law. Nazi ideology impinged upon and continued to impact all continuing aspects of the Nazi regime and changed the legal system as a whole so that it no longer looked like what had come before it, but nor did it resemble absolute terror. The second implication is that law continued to function in a recognisable—but different—form across the spectrum of the system, and this cannot just be seen as a set of technical rules engaged in the administration of society.

The difficulty that Nazi law presents for the concept of law and prevailing paradigms of interpretation is that, far from taking purely the form of law and manipulating it for personal

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<sup>55</sup> STOLLEIS: *op. cit.*, 216.

(regime) gain absent any substantive ethical content, it was ultimately closer to pure substance, lacking the formal requirements of law but with a normative basis founded in Nazi ideology. According to this, “the primary Nazi standard of ‘good law’ was taken to be the advancement, purification and collective properties thought to be essential to the flourishing of the German ‘Blood-community’ (*Blutsgemeinschaft*)”, rather than a formal rule of recognition or formalistic principles of morality.<sup>56</sup> Instead of the law being used in any way necessary to maintain power, the ultimate Nazi ideal was that “ethical principles should be embedded in law”.<sup>57</sup> The national community was considered to have an ethical compass, a “healthy popular sentiment”, embodied in the person of the Führer and embedded in the interpretation of the law. This was contrary to liberal principles of legality, and clearly “represented a gross departure from the rule of law”<sup>58</sup> and the obliteration of its key tenets, but it is not so simple as to say these were replaced with disorder, anarchy, lawlessness and barbarity.

An important consequence of the dissolution of law into ideology was the denial of a distinct and independent coherence to legality. This was in some ways the absolute instrumentalism of the law to the services of the ruling (totalitarian, authoritarian) ideology, but not merely the residue of the *Rechtsstaat*, and not just in the service of repression, terror and the pursuit of power. All law in all forms would have ultimately taken on the formless substance dictated by Nazi ideology, with the defective purpose of advancing the national community and suppressing perceived racial and political enemies. Law in Nazi Germany was used, as an instrument of ideology, to construct and foster national and racial identity within the community, and at the same time to repress the population and ensure the maintenance of the stranglehold of Nazi rule. We can choose to call everything that departed from the pre-existing *Rechtsstaat* “non-law” if we so wish, but that misrepresents the history of Nazi rule and denies the complicity of law with Nazi ideology.

The essence of Franz Neumann’s argument about law in the Nazi state, which constituted a lawless, anarchic chaos, is that “[i]f general law is the basic form of right, if law is not only *voluntas* but also *ratio*, then we must deny the existence of law in the fascist state”.<sup>59</sup> More recently undertaken historical research, however, shows us that “the extent to which there was

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<sup>56</sup> Carolyn BENSON, Julian FINK: *Introduction: New Perspectives on Nazi Law*, Jurisprudence, 3(2012)/2, 341-346, 342.

<sup>57</sup> Herlinde PAUER-STUDER: *Law and Morality under Evil Conditions: The SS Judge Konrad Morgen*, (2012) 3(2) Jurisprudence, 3(2012)/2, 367-390, 371.

<sup>58</sup> BENSON, FINK: *op. cit.*, 341.

<sup>59</sup> NEUMANN: *op. cit.*, 451. Italics in original.

actually an internal logic to the legal system implemented by the Nazi regime is striking. There was an underlying ideology at the heart, driving the regime”.<sup>60</sup> On the face of it these two statements about Nazi law may not appear impossible, but the way the first analysis is argued and its strong connection to natural law theory and the claim that law was only crudely manipulated as an instrument of terror, means that it cannot really be reconciled with the second assertion. National Socialist ideology provided a rationale and reasoning for the legal system of the Third Reich. Therefore, while Nazi law did operate as a tool of repression and an instrument of terror, it also embodied a racial ideology that included a vision of legality that was often at odds with the *Rechtsstaat* that had come before it, but should not be denied interrogation as a matter of law on that basis. If we want to really understand the instrumentalism of law at the hands of the Nazi regime, we need to search beneath the “tinsel of legal form” and uncover the darker side of Nazi legal reality.

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<sup>60</sup> Harry REICHER: *Evading Responsibility for Crimes Against Humanity: Murderous Lawyers at Nuremberg*, eds. STEINWEIS, RACHLIN, Berghahn Books, New York, 2013, 143.



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